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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
(HONORABLE JUDGE BARRY TED MOSKOWITZ)**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FELIX MOJICA-PERALTA,

Defendant

CASE: 307-cr-02984-BTM-1

DATE: _02/15/08

TIME: 2:30 PM

NOTICE OF MOTION; MOTION TO
COMPEL DISCOVERY; LEAVE TO
FILE FURTHER MOTIONS; POINTS
AND AUTHORITIES

NOTICE

TO: THE UNITED STATES ATTORNEY

PLEASE TAKE NOTICE that on the above-referenced date, Defendant, FELIX MOJICA-PERALTA, by and through his counsel, CHRISTIAN DE OLIVAS, attorney of record will move this Court to grant the above-entitled motions.

MOTION

The Defendant, FELIX MOJICA-PERALTA, by and through his counsel, CHRISTIAN DE OLIVAS, and pursuant to Federal Rules of Criminal Procedure Evidence 7(f), 12, 14, and 16, and the Fourth, Fifth and Sixth Amendments to the

1 United States Constitution, hereby moves this Court to grant the above-stated
2 motions.
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5 **DATED:** February 6, 2008 **SIGNED:** /s/ Christian De Olivas
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7 CHRISTIAN DE OLIVAS

8 ATTORNEY FOR DEFENDANT
9 FELIX MOJICA-PERALTA
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STATEMENT OF CASE

The defendant, FELIX MOJICA-PERALTA, is charged in an indictment with one charge associated with a Deported Alien Found In The United States.

I.

MOTION TO COMPEL DISCOVERY

A. Defendant is Entitled to Discovery of His Statements

Pursuant to Rule 16(a)(1)(A), and Brady v. Maryland, 373 U.S. 83 (1963), and the Fifth and Sixth Amendments to the United States Constitution, FELIX MOJICA-PERALTA requests the disclosure of all statements, written, oral and recorded, made by him, which are in the possession, custody, or control of the government, or which by the exercise of due diligence may become known to the government, regardless of to whom the statements were made.

This request includes verbatim transcripts of all statements as well as the substance of all oral statements made by FELIX MOJICA-PERALTA to government agents and other persons. This includes all rough notes of government agents, which include statements of FELIX MOJICA-PERALTA. This request includes all Federal Agencies and any local associated agency, and other government reports and rough notes containing the above-mentioned statements; all recorded statements taken from FELIX MOJICA-PERALTA regarding the present case; all documentation, which contains statements allegedly made by FELIX MOJICA-PERALTA.

1 A defendant has a right to inspect these requested statements. This has been
2 extended to permit discovery of written summaries of the defendant's oral
3 statements contained in handwritten notes of government agents. See United
4 States v. Johnson, 525 F.2d 999 (2d Cir. 1975); Loux v. United states v. Bailleaux,
5 685 F.2d 1105 (9th Cir. 1982).
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8 **B. The Defendant is Entitled to Disclosure of Any Prior Convictions or**
9 **Prior Similar Acts**
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11 Fed.R.Crim.P. 16(a)(1)(B) provides that upon request of the defendant, the
12 government shall furnish to the defendant a copy of his prior criminal record, if
13 any, as is within the possession, custody, or control of the government. FELIX
14 MOJICA-PERALTA makes this request.
15

16 The defendant also requests that the government provide discovery of any
17 prior similar acts, which the government will intend to introduce into evidence
18 pursuant to Fed.R.Evid. 404(b). The defendant must have access to this
19 information in order to make appropriate motions to exclude the use of such
20 evidence at trial. See United States v. Cook, 609 F.2d 1174 (9th Cir. 1985).
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23 The defendant requests a pre-trial conference on the morning of the trial in
24 order to resolve any issues raised by the government's intention to introduce such
25 evidence.
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C. The Defendant is Entitled to Examine any Documents, Tangible Items, and the Like Which are in the Possession, Custody, or Control of the Government

Pursuant to Fed.R.Crim.P. 16(a)(1)(C) and Brady v. Maryland, 373 U.S. 83 (1963), the defendant requests the opportunity to inspect and copy all books, papers, documents, photographs, and tangible items which are in the possession, custody, or control of the government and which are material to the preparation of the defense intended for use by the government as evidence in the case in chief.

The defendant further makes these requests pursuant to Brady v. Maryland on the ground that this evidence provides exculpatory information that is beneficial to the defendant in his defense against the charges against him in the indictment.

This request encompasses all such information in the possession of any federal, state or local agency, which has information regarding the investigation of this Defendant.

This request includes but is not limited to the following: all search warrants and their accompanying affidavits, as well as the opportunity to inspect the results of all searches conducted by law enforcement officers pursuant to warrants and their accompanying affidavits, as well as the opportunity to inspect the results of all searches conducted by law enforcement officers pursuant to warrants and/or

1 otherwise (this request includes the searches of all residences, businesses,
2 automobiles, and other locations regarding this case); all tape recorded
3 conversations, closed circuit television surveillance, ground/air surveillance of
4 suspects, telephone toll analysis, bank records and financial documents involving
5 this case. This request also includes the results of all follow-up investigations
6 regarding the above-requested evidence. These requests are made pursuant to
7 Fed.R.Crim.P. 16 and Brady v. Maryland, 373 U.S. 83 (1963).
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11 **D. Due Process Exculpatory Information**

12 Pursuant to Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States,
13 405 U.S. 150 (1972), and the Fifth and Sixth Amendments to the United States
14 Constitution, FELIX MOJICA-PERALTA requests disclosure of all information of
15 whatever form, source or nature which tends to exculpate him by indicating his
16 innocence, contradicting the Government's theory of the case, and impeaching the
17 credibility of potential government witnesses. This request specifically includes all
18 co-conspirator statements, indicted and unindicted, all third party witness
19 statements interviewed by government agents and/or of which the government
20 has custody, dominion or control. This request includes all recorded
21 conversations, electronic, mechanical, stenographic or otherwise, of all
22 coconspirators, indicted and unindicted, all defendants, and all potential witnesses
23 which statements are relevant to the subject matter charged in the indictment and
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1 are in the possession, custody or control of the government. It also includes such
2 statements within the meaning of Title 18 U.S.C. Section 3504.
3

4 FELIX MOJICA-PERALTA requests the government provide all statements
5 made by all potential witnesses. The term "statements" as used in this request
6 includes tape-recorded conversations, rough notes, correspondence, memoranda
7 or reports prepared directly by such persons and/or by any government agents (of
8 any government entity) or attorneys. It includes all Grand Jury testimony, as well
9 as previous in-court and trial testimony. It includes all government debriefings of
10 all potential witnesses. If such statements were prepared orally to any government
11 agent, FELIX MOJICA-PERALTA requests that they be committed to writing and
12 produced forthwith.
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16 FELIX MOJICA-PERALTA requests access to prior testimony of all
17 government witnesses. Two (2) statutory provisions and one (1) major
18 constitutional provision must be considered in resolving any questions involving
19 compelled disclosure of government witness statements. First, the Jencks Act, 18
20 U.S.C. Section 3500, regulates disclosure of witness statements, as defined by the
21 Act, and prohibits any order requiring production prior to the completion of direct
22 examination of the witness. Second, Rule 16(a)(2) excepts from the operation of
23 the general discovery provisions of Rule 16 those reports, memoranda and internal
24 government documents generated during the course of an investigation into the
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1 case, except as provided in the Jencks Act. The Rule does not prohibit the
2 disclosure of such items, but states, merely, that it does not authorize them.

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4 Third, an overriding principle requires the government to disclose all
5 exculpatory material in its possession. See Brady v. Maryland, 373 U.S. 83 (1963).
6
7 FELIX MOJICA-PERALTA makes his request under all three provisions. Although
8 the Jencks Act and the Federal Rules may act as limitations on the time at which
9 access to discoverable material may be had, neither statutory provision can limit
10 the constitutional requirement of disclosure of exculpatory material under Brady.
11
12 In fact, although there has been some dispute on the point, it is now clear that the
13 Jencks Act was not meant as a limitation on the scope of discovery to which a
14 defendant is entitled, as expressed in Jencks v. United States, 353 U.S. 657 (1957),
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16 but rather a reaffirmation of the essential nature of that discovery:

17
18 "That the Act was not intended to limit the Jencks decision is
19 apparent from its legislative history. Rather than limit, the Act
20 'reaffirms' (Jencks) in its holding that a defendant on trial in a
21 criminal prosecution is entitled to relevant and competent
22 reports and statements in possession of the government
23 touching the events and activities as to which a government
24 witness has testified at trial."

25 See S.Rep.No. 981, 85th Cong., 1st Sess., 3 (1957) U.S. Code Cong
26 & Admin. News, 1957, pp. 1861, 1862. Goldberg v. United States,
27 425 U.S. 94, 104 (1976).

28 With regard to pure Jencks Act material, therefore, the provisions of the Act
regulating timing of discovery may control. However, the Ninth Circuit has

1 indicated in the past the desirability of "encouraging" the government to disclose
2 Jencks Act statements prior to trial. See United States v. Spagnuolo, 515 F.2d 818,
3 821 (9th Cir. 1975). The Act, by its terms, provides for a reasonable defense
4 continuance after the release of Jencks material to prepare for cross-examination.
5 In this case it is apparent that the length of the "reasonable" continuance, which is
6 directly proportional to the work to be done during that continuance, would be
7 substantial. Consequently, there could be an inordinate delay interrupting the
8 course of trial if the Jencks Act were strictly followed. As such, FELIX MOJICA-
9 PERALTA requests early production of this material.
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14 Not all statements obtained during the course of the government
15 investigation fall within the parameters of the Jencks Act. The Act, and Rule
16 16(b)(2) apply, by their terms only, to persons whom the government does not
17 intend to call as witnesses; such statements are discoverable as Brady material. See
18 United States v. Marshak, 364 F.Supp.1005, 1007-1008 (S.D.N.Y. 1973). As to those
19 materials, the Jencks Act time limitations do not apply and discovery should be
20 provided immediately.
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23 In addition, certain comments of government witnesses that have been
24 recorded do not fall within the Jencks Act time limitations, but do fall within
25 Brady. The Jencks Act is quite specific with regard to those materials that are
26 "statements" within the meaning of the Act. These include the following:
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1 (1) a written statement made by said witness and signed or otherwise adopted
2 or approved of by him;

3
4 (2) stenographic, mechanical, electrical or other recording, or a transcription
5 thereof, which is substantially verbatim recital of an oral statement made by
6 said witness and recorded contemporaneously with the making of such oral
7 statement; or,
8

9 (3) a statement, however taken or recorded, or transcription thereof, if any,
10 made by said witness to a grand jury. See 18 U.S.C. Section 3500(e).
11

12 With regard to non-Grand Jury materials, the comments of a government
13 witness are only "statements" within the meaning of the Jencks Act if they were
14 approved and acknowledged by the witness or if they are verbatim recitals of the
15 witness' words. Thus, in Goldberg v. United States, 425 U.S. 94, 104 (1976), the
16 Supreme Court made clear that, absent such adoption or verbatim recital, the
17 statements are not discoverable under the Jencks Act. The court reasoned that the
18 government witness should not be impeached by the written or recorded
19 document unless it was accurate or accepted by the witness as accurate. Thus, for
20 example, if a government investigator questioned a witness and merely
21 summarized the witness' testimony, without giving him an opportunity to
22 acknowledge or correct it, the material would not come within the Jencks Act, and
23 would not be discoverable under that theory.
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1 In this case, however, FELIX MOJICA-PERALTA wishes to make other use of
2 similar reports. The use to which it will be put in this case requires discovery under
3 Brady. The court in Goldberg was clearly concerned with the use of the statements
4 as impeachment per se. Thus, if under the Jencks Act, it is not a verbatim or
5 accepted transcription, the witness cannot be impeached by the writing of
6 another.

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9 Clearly, however, the witness may be impeached by the testimony of a
10 government agent, which contradicts the witness' testimony. Such a statement
11 from a government investigator would amount to a prior inconsistent statement,
12 which would be admissible even if the investigator had made no report. The
13 defense, however, would have no way of knowing of the existence of the interview,
14 and thus the existence of the possible inconsistent or otherwise impeaching
15 testimony from a government investigator, absent disclosure of the agent's report.
16 Consequently, disclosure of those portions of reports or other documents which
17 reveal such inconsistencies, whether or not the report concerned an interview with
18 the witness, are discoverable under Brady. The exclusions of the Jencks Act and
19 Rule 16 are inapplicable.

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22 As part of this request FELIX MOJICA-PERALTA also requests the name,
23 address and telephone number of each person the government intends to call as a
24 witness at trial.

1 Additionally, he requests the name, address and telephone number of each
2 person who was present during, or has material information regarding, any act or
3 transaction charged in the indictment, whether or not the government intends to
4 call such a person as a witness at the trial. The request includes a list of all
5 witnesses appearing before the Grand Jury in connection with this case. Advance
6 disclosure of witnesses is essential if FELIX MOJICA-PERALTA's Sixth Amendment
7 right to effective assistance of counsel is to have any real meaning. This request is
8 properly before the court. See United States v. Cadet, 727 F.2d 1453, 1469 (9th Cir.
9 1984); Wilson v. Rose, 366 F.2d 611 (9th Cir. 1966).

10
11 Pursuant to Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States,
12 405 U.S. 150 (1972); Davis v. Alaska, 415 U.S. 308 (1974), FELIX MOJICA-PERALTA
13 makes the following request for:

14
15 (1) All impeaching evidence such as prior records, prior inconsistent
16 statements, evidence for bias, interest, or motive, and prior uncharged bad
17 acts of all the potential witnesses in this case;

18
19 (2) All formal or informal promises to reward a witness, such as promises of
20 probation, promises of monetary gain, payment of living or medical
21 expenses, payment for transportation or promises of witness protection;
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(3) All information relating to alcohol or drug abuse treatment of all potential witnesses, and all information relating to drug uses of each potential witness;

(4) All information relating to the use of aliases or fictitious names by each potential government witness;

(5) All information relating to prior acts of all potential witnesses which are probative of his character for untruthfulness within the meaning of Fed.R.Evid. 608(b); and,

(6) All information relating to contradictory statements made by all potential government witnesses or agents or representative of any law enforcement entity or other persons.

E. FELIX MOJICA-PERALTA Requests all Statements made by any Indicted or Unindicted Co-conspirators or Co-defendants

FELIX MOJICA-PERALTA specifically requests all co-conspirators statements, whether recorded or unrecorded, oral or written, signed or unsigned, in the government's possession, which are relevant to this case. This request includes statements: (a) made to government agents, either with or without the individual's knowledge that such persons were government agents at the time he or she made the statement; (b) made to persons other than government agents whom the government intends to call as witnesses in this case; and, (c) made to

1 persons other than government agents whom the government does not intend to
2 call as witnesses in this case.

3
4 With regard to any statements claimed to have been made by unindicted
5 coconspirators and/or co-defendants during the course of, or subsequent to the
6 commission of, the acts charged in the indictment, FELIX MOJICA-PERALTA
7 requests disclosure of: (a) the date of each alleged statement; (b) the name,
8 address and telephone number of each person present when the statement was
9 made; (c) whether the statement was memorialized in any manner, including
10 rough notes, memoranda, investigative reports, tape recordings, transcripts or
11 grand jury testimony; and, (d) copies of any such report or memoranda.
12 Statements made by FELIX MOJICA-PERALTA's alleged co-conspirators are
13 admissible against him under Rule 801(d)(2)(E) of the Fed.R.Evid., only if certain
14 foundational requirements are satisfied. See United States v. Weiner, 578 F.2d 757,
15 768 (9th Cir.), cert. denied, 439 U.S. 981 (1978) (co-conspirator hearsay is
16 admissible only when a foundation is laid to show that the declaration was in
17 furtherance and made during pendency of the conspiracy).

18
19 Pre-trial production of all statements which the government intends to
20 introduce under Rule 801(d)(2)(E) will enable counsel to determine in advance
21 whether the applicable foundational requirements have been satisfied and to
22 challenge objectionable statements that were made through an appropriate
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1 motion in limine prior to trial. In this connection, it is important to note that not
2 all statements made by co-conspirators during the course of the conspiracy are
3 admissible under Rule 801(d)(2)(E). The Ninth Circuit has held, for example, that
4 statements of historical fact, casual admissions to coconspirators, and other
5 statements which do not advance the common objectives of the conspiracy are
6 inadmissible. See e.g., United States v. Bibbero, 749 F.2d 581 (9th Cir. 1984); United
7 States v. Fielding, 630 F.2d 1357, 1365 (9th Cir. 1980); United States v. Castillo, 615
8 F.2d 878, 882, 883 (9th Cir. 1980); United States v. Moore, 522 F.2d 1068, 1075-1077
9 (9th Cir. 1975), cert. denied, 423 U.S. 1049 (1976).

10
11 In addition, the compelling practical considerations favoring pre-trial
12 discovery of co-conspirator's hearsay statements, FELIX MOJICA-PERALTA is
13 entitled to this disclosure. Since co-conspirators are deemed to be agents of the
14 defendant when made in furtherance of the conspiracy, the Jencks Act would not
15 prevent disclosure.

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17 Additionally, since a co-conspirator statement is admissible against the
18 defendant as if it were his or her own, such statements are discoverable under Rule
19 16(a)(1)(A). See United States v. Thevis, 84 F.R.D. 47, 50 (N.D.Ga. 1979); United
20 States v. Turkish, 48 P.F. Supp. 874, 882 (S.D.N.Y. 1978).

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22 In addition to his right to discover statements he made and statements of
23 coconspirators, a defendant is also entitled to discovery of information concerning
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1 the circumstances under which those statements were made. See United States v.
2 Feinberg, 502 F.2d 1180, 1181 (7th Cir. 1974), cert. denied 420 U.S. 926 (1975); United
3 States v. Brighton Building & Maintenance Company, 435 U.S. 222 (N.D. Ill. 1977).
4 In Feinberg, (as further explained in Brighton Building), the Court of Appeals for
5 the Seventh Circuit made clear that regardless of a defendant's entitlement to
6 discover statements he made, the trial court may grant discovery of information
7 concerning the circumstances of those statements. Thus, in Brighton Building, the
8 court ordered disclosure of the name and address of persons to whom statements
9 were made, as well as the date and places of those statements. Feinberg holds that
10 this information does not fall within the Jencks Act and thus is discoverable under
11 Rule 16. See Feinberg, 502 F.2d at 1181.

12 This request also seeks discovery of any post-conspiracy statements or
13 admissions made by alleged co-conspirators. Early production of these statements
14 is appropriate in order to insure that the requirements of Bruton v. United States,
15 391 U.S. 123 (1968) are satisfied and to allow counsel to file an appropriate motion
16 for severance, if it becomes relevant.

23 **F. Request for Expert Witness Information**

24 Pursuant to Fed.R.Crim.P. 16(a)(1)(A) and Brady v. Maryland, 373 U.S. 83
25 (1963), FELIX MOJICA-PERALTA requests to inspect and copy or photograph any
26 results or reports of physical or mental examinations and of scientific tests or
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1 experiments which are within the possession, custody or control of the
2 government, the existence of which is known, or by the exercise of due diligence
3 may become known to the attorney for the government, and which reports are
4 material to the preparation of the defense or intended for use by the government
5 as evidence in their case in chief at trial.
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8 In regards to this expert information, FELIX MOJICA-PERALTA requests all
9 rough notes, memoranda, correspondence and reports setting forth the results,
10 whether positive or negative, of all expert analysis conducted during the course of
11 the investigation of this case.
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14 In regards to this request for expert witness information, FELIX MOJICA-
15 PERALTA requests all expert analysis regarding fingerprints on any of the seized
16 evidence, scientific analysis of any of the recorded conversations and/or closed
17 circuit television surveillance.
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19 In regards to this latter request, FELIX MOJICA-PERALTA requests the
20 opportunity to perform his own scientific analysis on all recorded conversations
21 and all closed circuit television surveillance conducted in this case.
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23 **G. FELIX MOJICA-PERALTA is Entitled to Government Disclosure of**
24 **the Evidence it Intends to Use Against Him at Trial**
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26 Pursuant to Fed.R.Crim.P. 12(d), FELIX MOJICA-PERALTA requests that
27 this court order the government to disclose the evidence it intends to use against
28

1 him at trial. This request includes any evidence which FELIX MOJICA-PERALTA
2 may be entitled to under Fed.R.Crim.P. 16 subject to any relevant limitation
3 prescribed by that Rule.
4

5 **II.**

6 **LEAVE TO FILE FURTHER MOTIONS**

7
8 A continuance may be warranted in this matter due to the fact that further
9 discovery is required in order to adequately prepare motions; at this date little
10 discovery has been provided. Accordingly, defendant prays for leave to file further
11 motions should such motions be warranted.
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15 Respectfully Submitted,

16 **DATED:** February 6, 2008

17 **SIGNED:** /s/ Christian De Olivas

18 CHRISTIAN DE OLIVAS

19 ATTORNEY FOR DEFENDANT
20 FELIX MOJICA-PERALTA
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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

1. I, CHRISTIAN DE OLIVAS, am a citizen of the United States and am at least eighteen years of age. My business address is 200 N. Bradford Ave., Ste L, Placentia, California 92870.
 2. I am not a party to the above-entitled action. I have caused service of the following documents: **Notice of Motion; Motion to Compel Discovery; Leave File for Further Motions; Points and Authorities** on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them:
 - a. Ms. Alessandra P. Serano, Assistant United States' Attorney
 3. I declare under penalty of perjury that the foregoing is true and correct.
- Executed on **February 6, 2008**.

DATED: February 6, 2008

SIGNED: /s/ Christian De Olivas

CHRISTIAN DE OLIVAS

ATTORNEY FOR DEFENDANT
FELIX MOJICA-PERALTA